Pasukhas Construction Sdn Bhd & Anor v MTM Millenium Holdings Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D1–24–366 OF 2007
MOHD HISHAMUDIN J
10 FEBRUARY 2009

Civil Procedure — Injunction — Interlocutory injunction — Applicable principles — Whether plaintiffs applied correct principles

The plaintiffs were awarded a construction contract by the first defendant at an agreed total contractual sum of RM29,250,000. The plaintiffs provided the first defendant with an on demand performance bond to secure the performance of the contract. Subsequently, both parties agreed to reduce the contractual sum to RM28,500,000 and the plaintiffs submitted their first progress claim certificate, certified by the architects/superintending officer and supported by the interim valuation quantity surveyor. However, the plaintiffs were subsequently informed by the architects/superintending officer that an item in the contract known as 'preliminaries' had been reduced from RM2,384,746 to RM650,000 and the plaintiffs were instructed to resubmit their first progress claim. The plaintiffs protested and argued that they were not agreeable to the reduction of the contract sum which was done unilaterally and requested the first defendant to honour the first progress claim certificate. The first defendant countered that it never agreed to a sum of RM2,384,746 for the preliminaries. At that juncture, the architect alleged that the plaintiffs had stopped work which was disputed by the plaintiffs. Nonetheless, the plaintiffs terminated the contract by reason of, inter alia, the alleged unilateral reduction of the preliminaries and the first defendant's refusal to honour the first progress claim certificate. The defendant called on the performance bond. The plaintiffs contended that the conduct of the defendant in calling on the bond was unconscionable and therefore applied for an interlocutory injunction pursuant to O 29 of the Rules of the High Court 1980 to restrain the first defendant from demanding for payment from the second defendant and/or receiving payment under an insurance guarantee for performance bond issued by the second defendant for the benefit of the first defendant and to restrain the second defendant from making payment to the first defendant.

Held, dismissing the application with costs:

(1) The second defendant ought not to have been made a party to the action since the plaintiffs' allegation of unconscionable conduct was only made against the first defendant and it is not suggested by the plaintiffs that the second defendant had notice of any fraudulent conduct on the part of the first defendant in its contractual relation with the plaintiffs (see para 10).

(2) Even if the plaintiffs were to succeed in establishing that the conduct of the first defendant was prima facie unconscionable, they would not be able to proceed further as they have applied the wrong principle, ie the unconscionability principle. The plaintiffs ought to have impressed the court that their case satisfied the *American Cyanamid* principles (see paras 15–21) *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149 followed.

[Bahasa Malaysia summary

Plaintif-plaintif telah diawardkan satu kontrak pembinaan oleh defendan pertama pada jumlah harga kontrak yang dipersetujui sebanyak RM29,250,000. Plaintif-plaintif memberikan defendan pertama bon pelaksanaan atas tuntutan untuk menjamin pelaksanaan kontrak tersebut. Kemudian, kedua-dua pihak bersetuju untuk mengurangkan jumlah kontrak kepada RM28,500,000 dan plaintif-plaintif mengemukakan sijil tuntutan kemajuan pertama mereka, yang disahkan oleh arkitek/pegawai yang mengawasi dan disokong oleh juruukur bahan penilaian sementara. Walau bagaimanapun, plaintif-plaintif telah kemudiannya diberitahu oleh arkitek/pegawai yang mengawasi bahawa salah satu item di dalam kontrak yang dikenali sebagai 'preliminaries' telah dikurangkan daripada RM2,384,746 kepada RM650,000 dan plaintif-plaintif diarahkan untuk mengemukakan semula tuntutan kemajuan pertama mereka. Plaintif-plaintif membantah dan menghujah bahawa mereka tidak bersetuju dengan pengurangan jumlah kontrak yang telah dilakukan secara unilateral dan meminta defendan pertama membayar untuk sijil tuntutan kemajuan pertama tersebut. Defendan pertama membalas bahawa ia tidak pernah bersetuju dengan jumlah RM2,384,746 untuk kerja permulaan. Pada masa itu, arkitek mendakwa bahawa plaintif-plaintif telah memberhentikan kerja yang dipertikaikan oleh plaintif-plaintif. Walau bagaimanapun, plaintif-plaintif menamatkan kontrak atas alasan, antara lain, pengurangan secara unilateral kerja awalan yang didakwa dan keengganan defendan pertama untuk membuat bayaran untuk sijil tuntutan kemajuan pertama tersebut. Defendan menuntut bayaran menurut bon pelaksanaan. Plaintif-plaintif menghujah bahawa tindakan defendan menuntut bayaran berdasarkan bon tidak berpatutan dan oleh itu memohon untuk injunksi

A interlokutori menurut A 29 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk menghalang defendan pertama daripada menuntut bayaran daripada defendan kedua dan/atau menerima bayaran di bawah jaminan insurans untuk bon pelaksanaan yang dikeluarkan oleh defendan kedua untuk faedah defendan pertama dan untuk menghalang defendan kedua daripada B membuat bayaran kepada defendan pertama.

Diputuskan, menolak permohonan dengan kos:

C (1) Defendan kedua tidak patut dijadikan pihak kepada tindakan oleh kerana dakwaan plaintif-plaintif mengenai tindakan yang tidak berpatutan adalah hanya dibuat terhadap defendan pertama dan ia tidak dimaksudkan oleh plaintif-plaintif bahawa defendan kedua mempunyai pengetahuan mengenai apa-apa tindakan fraud oleh pihak D defendan pertama dalam perhubungan kontraknya dengan plaintif-plaintif (lihat perenggan 10).

(2) Walaupun plaintif-plaintif berjaya dalam membuktikan bahawa tindakan defendan pertama tidak berpatutan secara prima facie, mereka E tidak akan boleh meneruskan secara lanjut kerana mereka telah mengaplikasi prinsip yang salah, iaitu prinsip ketidakpatutan. Plaintif-plaintif sepatutnya memuaskan mahkamah bahawa kes mereka memenuhi prinsip *American Cyanamid* (lihat perenggan 15–21). *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149 F diikuti.]

Notes

For cases on interlocutory injunction, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2860–2862.

G **Cases referred to**

American Cyanamid v Ethicon [1975] 1 AC 396, HL (folld)

Bains Harding (Malaysia) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd & Ors [1996] 1 MLJ 425, HC (refd)

H *Bocotra Construction Pte Ltd & Ors v AG (No 2)* [1995] 2 SLR 733, CA (not folld)

Deutsche Ruckversicherung AG v Walbrook Insurance Co [1994] 4 All ER 181, QBD (refd)

Edward Owen Engineering Ltd v Barclays Bank International Ltd & Anor I [1978] 1 All ER 976, CA (refd)

Elcorp Resources Sdn Bhd & Anor v Perbadanan Putrajaya & Anor [1999] 1 CLJ 588, HC (refd)

Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149; [1995] 1 CLJ 283, SC (folld)

GHL Pte Ltd v Unitrack Building Construction Pte Ltd v Anor [1999] 4 SLR 604, CA (refd)
Kirames Sdn Bhd v Federal Land Development Authority [1991] 2 MLJ 198, HC (refd)
LEC Contractors (M) Sdn Bhd (formerly known as Latteworld Engineering & Construction Sdn Bhd v Castle Inn Sdn Bhd & Anor [2000] 3 MLJ 339; [2000] 3 AMR 2625, CA (folld)
Malaysia Overseas Investment Corporation Sdn Bhd v Sri Segambut Supermarket Sdn Bhd [1986] 2 MLJ 382, HC (refd)
Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd & Anor [1999] 2 SLR 368, HC (refd)
Nafas Abadi Holdings Sdn Bhd v Putrajaya Holdings Sdn Bhd & Anor [2004] MLJU 148, HC (refd)
Patel Holdings Sdn Bhd v Estet Pekebun Kecil & Anor [1989] 1 MLJ 190, HC (refd)
Perkasa Duta Sdn Bhd v Perbadanan Kemajuan Negeri Selangor [2002] 2 CLJ 307, HC (refd)
Potton Homes Ltd v Coleman Contractors Ltd (1984) 28 Build LR 19, CA (refd)
Radio & General Trading Co Sdn Bhd, The v Wayss & Freytag (M) Sdn Bhd [1998] 1 MLJ 346, HC (refd)
Samwoh Asphalt Premix Pte Ltd v Sum Cheong Piling Pte Ltd & Anor [2002] 1 SLR 1, CA (refd)
TTI Team Telecom International Ltd and another v Hutchinson 3G UK Ltd [2003] 1 All ER (Comm) 914 (refd)

Legislation referred to

Rules of the High Court 1980 O 29

Gideon Tan (Vincent Tan and Cliff Siow with him) (Gideon Tan Razali Zaini) for the plaintiffs.
K Nayagam (Shannon Rajan with him) (Skrine) for the first defendant.
Lydia Lee (Raja Daryll & Loh) for the second defendant.

Mohd Hishamudin J:

[1] Enclosure 3 is an interlocutory application by the plaintiffs/applicants for an interlocutory injunction pursuant to O 29 of the Rules of the High Court 1980 to restrain the first defendant from demanding for payment from the second defendant and/or receiving payment of the sum of RM1,462,500 or any sum whatsoever under an insurance guarantee for performance bond issued by the second defendant, Lonpac Insurance Berhad, for the benefit of the first defendant. The plaintiffs are also seeking an interlocutory injunction against the second defendant to restrain the latter from making payment to the first defendant.

[2] I have dismissed the application with costs, and I shall now state my reasons.

[3] I shall begin by setting out briefly the background facts and the basic issues.

[4] Pursuant to a letter of acceptance dated 27 August 2007 issued by the first defendant to the plaintiffs, the plaintiffs were awarded a construction contract at an agreed total contract sum of RM29,250,000. Upon the award of the construction contract, the plaintiffs provided the first defendant with an on demand performance bond to secure the performance of the contract by the plaintiffs. Subsequently, the parties agreed to reduce the contract sum to RM28,500,000. The plaintiffs submitted their first certified progress claim on 8 October 2007. The claim was certified by the architect/superintending officer and supported by the interim valuation signed by the first defendant's quantity surveyor. However, on 14 November 2007, the architect/superintending officer wrote to the plaintiffs informing the latter that an item in the contract known as 'preliminaries' had been reduced from RM2,384,746 to RM650,000; and instructed the plaintiffs to resubmit the first progress claim. The plaintiffs protested: they wrote back on 19 November 2007 to the architect and the defendant stating that they were not agreeable to a reduction of the contract sum, which from the plaintiffs' standpoint was done unilaterally; and requested the first defendant to honour the first progress claim. The first defendant on their part averred that they had never agreed to a sum of RM2,384,746 for preliminaries. At this juncture, the architect by a letter dated 15 November 2007 alleged that the plaintiffs had stopped work on 10 November 2007. This allegation was also disputed by the plaintiffs. By reason of the alleged unilateral reduction of preliminaries, the alleged refusal on the part of the first defendant to honour the first certificate and the allegation about them having stopped work, the plaintiffs terminated the contract. The defendant, in turn, called on the performance bond.

[5] Learned counsel for the plaintiffs, Encik Gideon Tan, submits that the principle to be applied in determining as to whether or not an interlocutory injunction ought to be granted so as to restrain the defendants from enforcing the performance bond is either the fraud principle or the unconscionability principle.

[6] It is the submission of Encik Gideon Tan that the fraud principle was applied in the following cases:

(1) *Edward Owen Engineering Ltd v Barclays Bank International Ltd & Anor* [1978] 1 All ER 976;

(2) *Malaysia Overseas Investment Corporation Sdn Bhd v Sri Segambut Supermarket Sdn Bhd* [1986] 2 MLJ 382;

(3) *Patel Holdings Sdn Bhd v Estet Pekebun Kecil & Anor* [1989] 1 MLJ 190

(4) *Kirames Sdn Bhd v Federal Land Development Authority* [1991] 2 MLJ 198; and

(5) *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149; [1995] 1 CLJ 283.

[7] And it is the submission of learned counsel for the plaintiffs that the unconscionability principle was applied in the following cases:

(1) *Potton Homes Ltd v Coleman Contractors Ltd* (1984) 28 Build LR 19;

(2) *Bocotra Construction Pte Ltd & Ors v Attorney General (No 2)* [1995] 2 SLR 733.

(3) *The Radio & General Trading Co Sdn Bhd v Wayss & Freytag (M) Sdn Bhd* [1998] 1 MLJ 346;

(4) *TTI Team Telecom International Ltd and another v Hutchinson 3G UK Ltd* [2003] 1 All ER (Comm) 914;

(5) *GHL Pte Ltd v Unitrack Building Construction Pte Ltd v Anor* [1999] 4 SLR 604;

(6) *Samwoh Asphalt Premix Pte Ltd v Sum Cheong Piling Pte Ltd & Anor* [2002] 1 SLR 1;

(7) *Elcorp Resources Sdn Bhd & Anor v Perbadanan Putrajaya & Anor* [1999] 1 CLJ 588;

(8) *Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd & Anor* [1999] 2 SLR 368;

(9) *Bains Harding (Malaysia) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd & Ors* [1996] 1 MLJ 425;

(10) *Perkasa Duta Sdn Bhd v Perbadanan Kemajuan Negeri Selangor* [2002] 2 CLJ 307; and

(11) The unreported case of *Nafas Abadi Holdings Sdn Bhd v Putrajaya Holdings Sdn Bhd & Anor* [2004] MLJU 148.

[8] In the present case, the plaintiffs are only relying on the unconscionability principle. The plaintiffs contend that the conduct of the first defendant in calling on the bond is unconscionable. I do, however, observe from Encik Gideon's written submission that there is a mild allegation of fraud on the part of the first defendant; but this is an issue which

is not seriously pursued by him (clearly not in his oral submission). Hence, I do not propose to touch on the allegation of fraud.

[9] In the Singapore Court of Appeal case of *Bocotra Construction* (a decision which Encik Gideon relies on) the court held:

> In our opinion, whether there is fraud or unconscionability is the sole consideration in applications for injunctions restraining payment or calls on bonds to be granted. Once this can be established, there is no necessity to expend energies in addressing the superflous question of 'balance of convenience'. It does not lie in the mouth of the defendant to claim that damages would still somehow be an adequate remedy.

[10] At the outset I will first deal with the second defendant. I am in agreement with Cik Lydia Lee, learned counsel for the second defendant (Encik K Nayagam, learned counsel for the first defendant shares the same view), that the second defendant ought not to have been made a party to the action in the first place since (as we shall soon observe) the plaintiffs' allegation of unconscionable conduct is only made against the first defendant. In this regard I only need to remind myself of what Lord Denning MR said in *Edward Owen v Barclays Bank International* (at p 983):

> A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.

[11] The above principle has been adopted by our courts in *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149 and *LEC Contractors (M) Sdn Bhd (formerly known as Lotteworld Engineering & Construction Sdn Bhd) v Castle Inn Sdn Bhd & Anor* [2000] 3 MLJ 339; [2000] 3 AMR 2625.

[12] Needless to say, it is not suggested in the present case by the plaintiffs that the second defendant has notice of any fraudulent conduct on the part of the first defendant in its contractual relation with the plaintiffs.

[13] In passing it is also pertinent to note that in *Bocotra* the court also held that:

> ... there is no distinction between the principles to be applied in cases dealing with attempts to restrain banks from making payment or those dealing with restraint of callers from calling for payment. This principle has been consistently endorsed in the English authorities, right up to recent cases such as *Deutsche Ruckversicherung AG v Walbrook Insurance Co* [1994] 4 All ER 181.

[14] Now, as regards the first defendant, in my view — and I am inclined to agree with the submission of Encik K Nayagam, learned counsel for the first defendant — the principle that is applicable is as laid down by the Supreme Court in *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149, and that is the *American Cyanamid* principles (see *American Cyanamid v Ethicon* [1975] 1 AC 396). In *Esso Petroleum Malaysia Inc*, Peh Swee Chin SCJ, in delivering the judgment of the Supreme Court, said (at p 158):

> Learned counsel for the appellant was at some pains to impress on us that the injunction should not have been granted by the lower court in the first place to restrain the buyer from receiving any sum of money under the two performance bonds in question on the ground that *American Cyanamid v Ethicon* [1975] AC 396; [1975] 2 WLR 316 had no application in a situation of restraint of payment on a bank guarantee.
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> While agreeing that the interlocutory ex parte injunction granted herein in the circumstances of this instant appeal should have been discharged by the learned judge, to say that *American Cyanamid* could not be considered in exercising any discretion in granting or withholding such an interlocutory injunction in regard to a bank guarantee was wide off the mark. Except in the case of a few exceptions which did not apply to the instant appeal, *American Cyanamid* would apply to all interlocutory injunctions.

[15] In the present case, I do not propose to go into detail on the affidavit evidence relied upon by the plaintiffs in order to show that the conduct of the first defendant is unconscionable. For, even if the plaintiffs were to succeed in convincing me that the conduct of the first defendant was prima facie unconscionable, it still gets the plaintiffs nowhere as they have applied the wrong principle, the unconscionability principle. What the plaintiffs ought to have done — but have failed to do so — is to impress the court that their case satisfies the *American Cyanamid* principles.

[16] It is, however, true that the Court of Appeal, five years later (after the Supreme Court's decision in *Esso Petroleum Malaysia Inc*) in *LEC Contractors (M) Sdn Bhd (formerly known as Lotteworld Engineering & Construction Sdn Bhd) v Castle Inn Sdn Bhd & Anor* [2000] 3 MLJ 339; [2000] 3 AMR 2625 (this case was also brought to my attention by Encik K Nayagam), applied the

fraud principle and rejected the *American Cyanamid* principles and the unconscionable conduct principle. The court said (at p 361 (MLJ); 2657 (AMR)):

> First of all we wish to point out that the authorities we have referred above clearly indicated that in order to justify any injunction to stop payment there must be clear evidence of fraud on the part of the first defendant which comes to the knowledge of the second defendant. Bad faith or unconscionable conduct by itself is not fraud.

[17] However, in my view, this ruling by the Court of Appeal is not consistent with the ruling of the Supreme Court in *Esso Petroleum Malaysia Inc*, that I have referred to earlier, although, interestingly, *Esso Petroleum Malaysia Inc* was in fact mentioned by the Court of Appeal in its judgment. Without mentioning that it disagreed with the decision of the Supreme Court in *Esso Petroleum Malaysia Inc*, the Court of Appeal said:

> The final point raised by counsel for the plaintiff is justice of the case. It was submitted that the status quo ought to be maintained to preserve the subject matter and substratum of the suit pending the disposal of the suit in respect of the underlying contract either through trial or arbitration. Counsel for the plaintiff contended that if the injunction is not granted, the bank will make the payment which will alter the status quo, which will cause irreparable prejudice and damages to the plaintiff. It was further contended that any prejudice to the first defendant could easily be compensated by payment of interest.
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> In our view 'justice of the case' is what the first defendant called 'the balance of convenience test'. This principle was propounded in the *American Cyanamid* case. It was contended by the first defendant that the test is not applicable to an on demand performance bond. This was decided by the Court of Appeal in Singapore in *Bocotra Construction Pte Ltd v Attorney General (No 2)* [1995] 2 SLR 733 where it was held that the balance of convenience test propounded in the *American Cyanamid* case is not applicable to an irrevocable letter of credit. Since an on demand performance bond is of the same status as irrevocable letters of credit that case applies in the present appeal.

[18] Indeed, in its judgment the Court of Appeal did not allude to the passages in Peh Swee Chin SCJ's judgment in *Esso Petroleum Malaysia Inc* that I have referred to in the earlier part of my judgment.

[19] With respect to the Court of Appeal, on my part, faced with the two inconsistent rulings, I am, needless to say, bound by the decision of the Supreme Court in *Esso Petroleum Malaysia Inc* the latter being the apex court.

[20] It is to be observed that although our Court of Appeal in its judgment referred to *Bocotra Construction* it, however, did not adopt the

unconscionability principle although the unconscionability argument was also advanced before the court. It only adopted the fraud principle. In fact, the Court of Appeal in its judgment never at all alluded to the passage in the judgment of the Singapore Court of Appeal in *Bocotra* that I have referred to earlier.

[21] In the light of *Esso Petroleum Malaysia Inc* and *LEC Contractors* I am not at liberty to apply the unconscionability principle as propounded by the Singapore Court of Appeal case of *Bocotra Construction* — although some of our High Court decisions that I have mentioned above have applied that principle. *Bocotra Construction*, being a decision of the Court of Appeal of Singapore, is a persuasive authority; and the principle of unconscionability that it enunciated appears to me to be a sound principle. But, regretably, I am bound by the doctrine of binding precedents. I am bound by the decision of the Supreme Court in *Esso Petroleum Malaysia Inc* (which applied the *American Cyanamid* principles) or, alternatively, by the decision of the Court of Appeal in *LEC Contractors* (which applied the fraud test).

Application dismissed with costs.

Reported by Mashrifah Ravendran